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No. 95-1431

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC., MME, INC., MIDNITE EXPRESS, INC. and EXPRESS CARTAGE, INC.,
Petitioners,
v.
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF THE REGULAR COMMON CARRIER CONFERENCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Regular Common Carrier Conference ("RCCC") moves for leave to file the brief *amicus curiae* in support of Petitioners, Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc. and Express Cartage, Inc.

The named Petitioners have consented in writing to the filing of a brief *amicus curiae* on behalf of the RCCC, and such consent has been filed with the clerk of this Court. Respondent has not consented.

The RCCC is a national, not-for-profit trade association, organized under the laws of the District of Columbia, whose members are motor carriers of property which transport predominately small, multiple shipments. This

association is affiliated with the American Trucking Associations, Inc. and was organized in 1938 to represent the particular needs of motor carriers transporting less-than-truckload freight. We do so by participating in legislative, regulatory and judicial proceedings, such as this one, that have substantial legal importance and financial impact on our transportation companies.

This association has 110 member trucking companies whose collective revenue in 1995 was approximately $10 billion. Of relevance to this judicial proceeding, our motor carrier members employ over 40,000 truck drivers and workers that belong to the International Brotherhood of Teamsters. The Petitioner, Midwest Motor Express, Inc. is a member of this association. These unionized motor carriers participate in one or more multiemployer pension plans, depending on the scope of their transportation service. Many of these unionized motor carriers contribute to the Central States Southeast and Southwest Areas Pension Fund ("Central States") whose conduct precipitated this petition when it commenced a lawsuit, before complying with notice and arbitration procedures of the Employee Retirement Income Security Act of 1974, ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("MPPAA") sections 4202, 4219 and 4221 (29 U.S.C. §§ 1382, 1399 and 1401).

As participants in multiemployer pension plans, RCCC members are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in Central States, which is a large, severely underfunded multiemployer pension plan. These employers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits since the trustees' sole fiduciary duty is to the employee participants. Consequently, the actions of Central States has resulted in substantial underfunding in the plan which has created withdrawal liability for employers that withdraw.

MPPAA was a major amendment to ERISA. It changed the rules on employers by subjecting them to an immediate withdrawal liability. The MPPAA sets forth detailed procedural, notice, conciliation and arbitration regulations to ameliorate the impact of withdrawal liability on employers. By filing a MPPAA withdrawal liability action before serving notice on Midwest, before Midwest's debt became due, before Midwest had an opportunity to cure, and before Midwest was in default, Central States flouted these procedural rules.

These statutory rules are critical for employers. They provide procedural due process of notice, the opportunity to evaluate a demand for withdrawal liability, to negotiate a settlement, if possible, and to arbitrate an unreasonable demand. These procedures provide checks and balances against unfair, unilateral action by plan trustees.

They are also designed to minimize litigation, by exhausting private and administrative remedies first. Litigation is a costly undertaking for employers, who are often in financial difficulty when a demand for liability occurs. Litigation is often much more onerous on an employer since the plan has more financial resources available. History has proven that the Central States plan is particular litigious. Consequently, it is essential that these statutory procedures, which afford employers due process, be adhered to by the trustees.

This case presents a critical question defining when a cause of action accrues under MPPAA. RCCC believes that the decision of the Court below, if permitted to remain in effect by a denial of Petitioner's Petition for Writ of Certiorari by this Court, will have a significant and substantial negative impact on the rights these MPPAA procedures provide to withdrawing employers.

Accordingly, amicus respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioners.

Respectfully submitted,

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AMICUS CURIAE BRIEF ON BEHALF OF THE REGULAR COMMON CARRIER CONFERENCE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Regular Common Carrier Conference is a national, not-for-profit trade association whose members are motor carriers of property which transport predominately small, multiple shipments. This association is affiliated with the American Trucking Associations, Inc. and was organized in 1938 to represent the particular needs of motor carriers transporting less-than-truckload freight. We do so by participating in legislative, regulatory and judicial proceedings, such as this one, that have substantial legal and financial importance to our transportation companies.

This association has 110 member trucking companies whose collective revenue in 1995 was approximately $10 billion. Of relevance to this judicial proceeding, our motor carrier members employ over 40,000 truck drivers and workers that belong to the International Brotherhood of Teamsters. The Petitioner, Midwest Motor Express, Inc. is a member of this association. These unionized motor carriers participate in one or more multiemployer pension plans, depending on the scope of their transportaiton service. Many of these unionized motor carriers participate in the Central States Southeast and Southwest Areas Pension Fund ("Central States"), whose conduct precipitated this petition when it commenced a lawsuit, before complying with notice and arbitration procedures of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") sections 4202, 4219 and 4221 (29 U.S.C. §§ 1382, 1399 and 1401).

As participants in multiemployer pension plans, RCCC members are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in Central States, which is a large, severely underfunded multiemployer pension plan.[1] These employers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits since the trustees' sole fiduciary duty is to the employee participants.[2] Consequently, the actions of Central States have resulted in substantial underfunding and has created withdrawal liability for employers that withdraw.

MPPAA was a major amendment to ERISA. It changed the rules on employers by subjecting them to an

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[1] Central States had an unfunded, vested liability of approximately $2.38 billion in 1992. See attached Appendix.

[2] *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981).

immediate withdrawal liability.[3] The MPPAA set forth detailed procedural, notice, conciliation and arbitration regulations to ameliorate the impact of withdrawal liability on employers. By filing a MPPAA withdrawal liability action before serving notice on Midwest, before Midwest's debt became due, before Midwest had an opportunity to cure, and before Midwest was in default, Central States flouted these procedural rules.

These statutory rules are critical for employers. They provide procedural due process of notice, the opportunity to evaluate a demand for withdrawal liability, to negotiate a settlement, if possible, and to arbitrate an unreasonable demand. These procedures provide checks and balances against unfair, unilateral action by plan trustees.

They are also designed to minimize litigation, by exhausting private and administrative remedies first. Litigation is a costly undertaking for employers, who are often in financial difficulty when a demand for liability occurs. Litigation is much more onerous on an employer since the plan has more financial resources available. History has proven that the Central States plan is particular litigious. Consequently, it is essential that these statutory procedures, which afford employers due process, be adhered to by the trustees.

The Supreme Court should take this opportunity to enforce MPPAA's procedural rules on Central States because the issue presented herein is one of fundamental due process and fairness in handling withdrawal liability issues. It has broad applications to all employer contributors to multiemployer pension plans. Accordingly, *amicus*

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[3] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). Prior to MPPAA, if PBGC did choose to extend a guarantee when a multiemployer plan terminated with insufficient assets to pay promised benefits an employer that had contributed to the plan in the five preceding years was liable to PBGC for the shortfall in proportion to its share of contributions during that five-year period, up to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362(b), 1364 (1976 ed.).

have a vital interest in the resolution of the MPPAA issue raised in this case:

> Whether a multiemployer pension plan may file a MPPAA withdrawal liability action before the plan has served notice on the employer, before the debt becomes due, before the employer has an opportunity to cure, and before the employer is in default?

Amicus RCCC believes it will bring insights and information beyond what is presented by Petitioner and Respondent, which will be useful to this Court in deciding the issues presented.

ARGUMENT

I. MPPAA REQUIRES A PLAN TO PROVIDE NOTICE AND A DEMAND FOR PAYMENT TO AN EMPLOYER BEFORE COMMENCING A LAWSUIT.

In its petition, Midwest set forth the undisputed facts in this case which demonstrate that Central States commenced its civil action the same day it mailed its notice and demand to Petitioner. The lawsuit was initiated before any withdrawal liability was due.

MPPAA specifically requires a plan to adhere to the following procedure: (1) determine the amount of the employer's withdrawal liability, 29 U.S.C. §§ 1382, 1391; (2) send the employer a notice and demand for payment, 29 U.S.C. § 1399(b)(1); (3) wait the statutory 60-day period to see whether the employer will pay, 219 U.S.C. § 1399(c)(2); (4) declare a statutory default and wait another 60 days to determine if the failure to pay is cured, 29 U.S.C. § 1399(c)(5)(A); and (5) sue to collect within six years. 29 U.S.C. § 1451(f)(1).

Central States' collection action was unauthorized by the enforcement provisions of MPPAA. First, ERISA Section 4301b) [29 U.S.C. 1451(b)] makes it clear that an action to compel payment is only appropriate if the

employer has failed to make withdrawal liability payments within the time prescribed.

Second, the jurisdictional provision of the MPPAA provides, in part:

> A plan fiduciary, employer, plan participant, or beneficiary, *who is adversely affected* by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (emphasis added). Until an employer has failed to make a demanded payment, and failed to cure, withdrawal in itself "does not visit any adverse affect upon the plan that gives rise to [a] cause of action." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C. Cir. 1989). The collection action was premature and not ripe and, thus, the Illinois district court lacked subject matter jurisdiction. *St. Clair v. Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989). Until Central States was adversely affected by Midwest's failure to make a withdrawal liability payment, there was no statutory basis upon which to claim jurisdiction in Central States' collection action. 29 U.S.C. § 1451(a). Therefore, the collection action was premature and in violation of MPPAA.

II. THE ISSUE PRESENTED HERE WILL REOCCUR REPEATEDLY ABSENT REVIEW BY THIS COURT.

Midwest has demonstrated in its brief that there is a conflict in the circuit courts on the issue presented herein. (Petition at 12-16). The Eighth Circuit's decision is inconsistent with the holdings in the four other circuits that have addressed this issue. Therefore, compelling reasons exist to grant the Petition for Writ of Certiorari and define when a cause of action under MPPAA accrues.

Moreover, this issue is likely to arise repeatedly in the future for a number of reasons. First, Central States operates in twenty-four states and receives contributions from a large number of companies.[4] The sheer size and number of employer contributors together with the large geographic expanse of the Central States plan ensures that the issue will reoccur in the future.

Second, the Central States plan is the most underfunded multiemployer pension plan in the nation, according to the Pension Benefit Guaranty Corporation. Central States' liabilities for vested benefits exceeded its assets by approximately $2.38 billion in 1992. This significant underfunding operates to trigger withdrawal liability on withdrawing employers.

Third, the adverse financial condition in the trucking industry has caused numerous trucking companies to cease operations and triggered withdrawal liability. Since 1980, many unionized companies, employing over 100,000 Teamster workers, have ceased operation. The trucking industry today is extremely competitive today. By all financial measures—profit margins, returns on investment or equity, and revenue per shipment—the industry is under financial stress. This is particularly true for the less-then-truckload segment presented by the unionized carriers. They are the higher cost motor carriers and consequently a significant number are operating with either a slim one or two percent profit margin or at a loss. Simply put, they live, month to month, with the possibility that they too may confront a withdrawal liability assessment in the future.

Besides cessation of business, there are a variety of activities that could trigger a withdrawal liability assess-

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[4] Central States operates in twenty-four states: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, North Carolina, Ohio, Oklahoma, South Dakota, South Carolina, Tennessee, Texas and Wisconsin.

ment. They include decertification of the union by the employees of the company,[5] pension fund expulsion,[6] or a disclaimer of interest by the union in the bargaining unit employees.[7] Consequently, there are numerous circumstances beyond the control of the employers that can trigger an involuntary withdrawal assessment.

Fourth, there are ten other multiemployer plans, with trucking company participants, that are currently underfunded, according to the PBGC. See Appendix. The enormous underfunding in these trucking plans poses a significant liability problem for the employer participants, if an event occurs that triggers a withdrawal liability assessment. Therefore, this case has broad ramifications beyond the Central States plan, as well as beyond trucking companies. It is vital that motor carrier employer's rights, as set forth in MPPAA, be safeguarded to protect them from unwarranted or unreasonable demands for payments by plan trustees.

CONCLUSION

Absent review by this Court, Central States will follow the same procedure in the future by lodging lawsuits in the Northern District of Illinois to secure a more favorable forum and litigation advantage because of this ruling by the Eighth Circuit. This will work a hardship on the employers, like Petitioner.

Consequently, it is vital that these pension plans are required to comply with the notice, assessment, conciliation and arbitration procedures to ensure the due process rights of employers are complied and maintained as es-

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[5] *Marvin Hayes Line, Inc. v. Central States Pension Fund,* 814 F.2d 297 (6th Cir. 1987).

[6] *Robbins v. Kohn Beverage Co.,* Slip Op., No. 84 C 3507 (DC ND IL 1985).

[7] *Western Teamster Pension Fund Trustees v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396 (9th Cir. 1984).

tablished by Congress in ERISA, as amended by MPPAA.

Without requiring multiemployer plans to strictly enforce the MPPAA procedural rules, the decision below exposes contributing employers to duplicative litigation that inevitably results from the transfer of an action to a court that may lack subject matter jurisdiction. Unless this Court establishes uniformity, valuable time, money and court resources will continue to be wasted.

Amicus submits that the decision of the Eighth Circuit is incorrect, and should be reversed. This Court should grant certiorari to define when a cause of action accrues under MPPAA in order to provide guidance to and uniformity among the circuit courts.

Respectfully submitted,

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APPENDIX

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UNDERFUNDED MULTIEMPLOYER PENSION PLANS[1]

SPONSOR	YEAR	ADJ UVB
Central States Teamsters	1992	$2,383,062,415
Sheet Metal Workers	1992	925,383,787
NYSA ILA Pension	1992	520,671,831
New England Teamsters	1992	495,267,928
Int Ladies Garment Wkrs	1992	488,501,324
UMW 1974 Plan	1992	427,291,363
Amalgamated Ins Fund	1991	289,123,070
S.Cal. Constr. Laborers	1992	288,302,057
Maj. Lg. Baseball Players	1991	249,731,627
Philadelphia Teamsters	1992	235,407,169
ILWU-PMA Pension Fund	1991	209,415,859
New York State Teamsters	1992	189,385,205
Operating Engineers	1991	122,727,365
Alaska Teamsters	1992	113,581,332
Western PA Teamsters	1991	109,754,736
Bricklayers & Trowel Trades	1991	94,467,466
District 65	1992	87,731,068
Northern California Carpenters	1991	87,286,701
Joint Electrical Ind. Bd.	1991	78,284,092
Central PA Teamsters	1992	75,597,126
S. Cal. Plumbing Heat & Piping	1992	73,179,801
Hawaii Carpenters	1991	71,775,699
No. Jersey Trucking Employees	1992	71,026,505
Milwaukee Brewery Workers	1992	69,603,083
Warehouse Employees Local 169	1992	65,722,853
UFCW Tri-State Pension	1992	60,496,850
Building Service 32B	1992	58,738,050
IUOE Locals 17, 106, 410, 463, 545	1992	55,028,169
Mass. Laborers	1991	53,720,486
Machinists District No. 15	1992	53,390,324
IUOE Locals 15, 15A, 15C, 15D	1992	52,884,146

[1] SOURCE: PBGC data generated from IRS Form 5500 transaction tapes. Liabilities were adjusted by PBGC using a common interest rate of 7.25 percent. ADJ UVB = Adjusted Unfunded Vested Benefits.

SPONSOR	YEAR	ADJ UVB
NY Hotel Trades	1992	51,050,480
Mass. State Carpenters	1992	46,550,060
Milwaukee Building Trades	1991	44,120,929
Buffalo Carpenters	1991	41,231,561
Const. Ind. Laborers Dist. Cncl.	1991	40,352,818
Western States Food Processing	1992	34,870,554
Local 478 Trucking & Allied	1992	33,024,399
Hoisting Engineers Local 513	1992	32,757,278
Norther Calf. Laborers	1991	30,067,795
IBT Local 705	1992	25,273,124
SEIU Local 74 Pension Fund	1992	20,217,715
Freight Drivers Local 557	1992	14,761,536
Teamsters Jt. Cncl. No. 83 of VA	1992	12,117,221
Elec. Contractors Local 134, IBEW	1992	7,282,174
New York City Carpenters	1992	4,160,008